

REDUCING SEXUAL ASSAULT AND SEXUAL HARASSMENT
IN THE US MILITARY

by
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ABSTRACT

The US military consists of 1.3 million Service members. Despite numerous reforms in the military's treatment of sexual assaults of Service members, recent data suggests that the problem persists at disturbing rates. The successful investigation, prosecution, and conviction of offenders remain significantly low. While the Pentagon is not ignoring the problem, the changes failed to reduce the incident rate of sexual assault and brought little progress in increasing reports and holding offenders criminally liable. Following several highly publicized sexual assault cases and media buzz, the problem received scrutiny from legislators. This capstone proposes a policy to reduce sexual violence by professionalizing how the military prosecutes serious crimes like sexual assault and removing command authority.

Advisor: Paul Weinstein

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MEMORANDUM FOR: Jackie Speier, Chairwoman of the Military Personnel Subcommittee, House Armed Services Committee

FROM: Audrey Boyce

SUBJECT: Sexual Harassment and Assault Reporting and Prevention in the Department of Defense

ACTION-FORCING EVENT

The Department of Defense (DOD) released its Fiscal Year 2019 Annual Report on Sexual Assault in the Military on April 30, 2020, reporting a three percent increase from 2018.¹ A hearing by the Military Personnel Subcommittee was held on July 29, 2020 to review the lack of sexual harassment reporting in the Department of Defense due to fear of retaliation after the disappearance and killing of a 20-year old Service member.²

STATEMENT OF THE PROBLEM

Sexual assault in the US military is usually recognized as a criminal act in the US military and generally defined as sexual contact or act upon an individual who cannot legitimately consent to it. Military life and experiencing sexual violence pose unique challenges. This is because men and women experiencing sexual assault or harassment live and work with an individual who committed such violence. In case the perpetrator outranks or supervises the victim, they might make threats against an individual career or

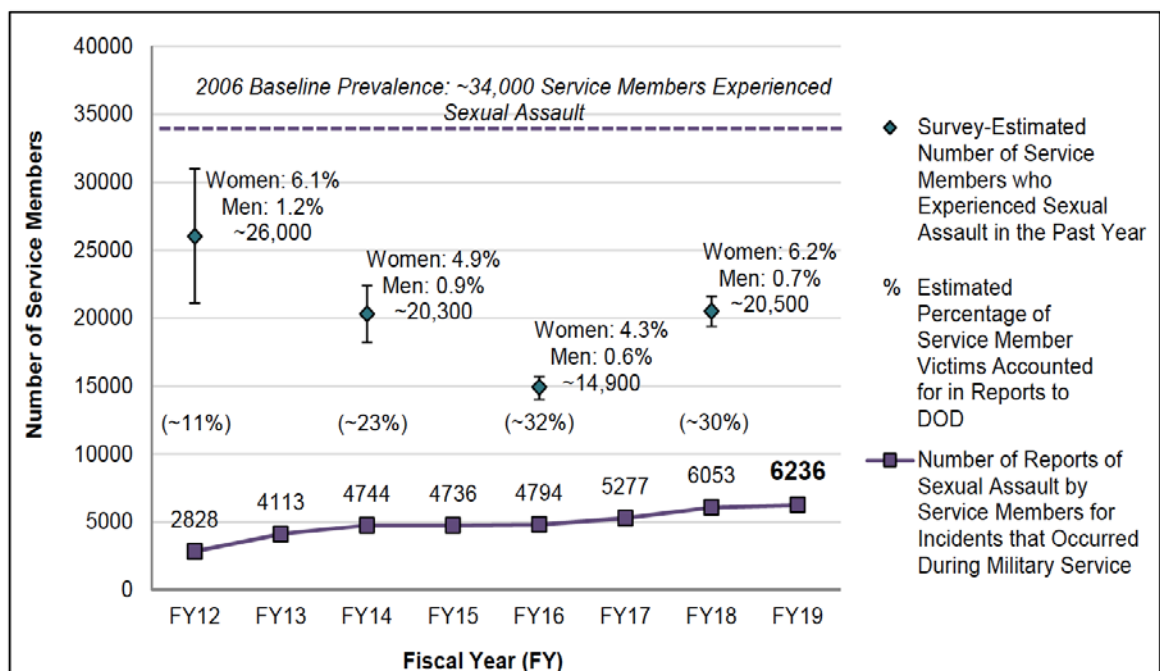
¹ "Department of Defense Fiscal Year 2019 Annual Report on Sexual Assault in the Military," U.S. Department of Defense, accessed September 2, 2020, https://media.defense.gov/2020/Apr/30/2002291660/-1/-1/1/1_DEPARTMENT_OF_DEFENSE_FISCAL_YEAR_2019_ANNUAL_REPORT_ON_SEXUAL_ASSAULT_IN_THE_MILITARY.PDF.

² "The Military's #MeToo Moment: An Examination of Sexual Harassment and Perceived Retaliation in the Department of Defense and at Fort Hood," Hearings, House Armed Services Committee, accessed September 2, 2020, <https://armedservices.house.gov/hearings?ID=181B4125-F673-405B-932B-100BCBAA4F3C>.

even shutting out options for support and help. Service members lack the option of leaving a job due to a hostile working environment and may be charged for not following orders. Currently, there is a cultural shift in the military due to a strong effort for recognition that sexual violence is an issue.

Sexual assault and violence have been prevalent in the US military since it affects service personnel of all sexualities, ranks, and ages. Around 6.2 percent of women and 0.7 percent of males aged 17-24 experienced abuse in fiscal year 2019.³ From that report, major sexual assaults in 2019 happened between persons who are working, training, or living close. Female service personnel indicated that lawbreakers were mainly acquaintances or friends. The report showed that young Service members entering their first duty station or are transferred to different duty stations are most susceptible.

Figure 1. Active Duty Estimated Biennial Prevalence Compared to Annual Reporting of Sexual Assault⁴



³ "Department of Defense Fiscal Year 2019 Annual Report on Sexual Assault in the Military."

⁴ Department of Defense, "2019 Annual Report on Sexual Assault in the Military."

There have been various theories and assumptions developed concerning the sexual assault causes, most of which are not mutually exclusive. The first factor for sexual violence in the military is gender stereotypes.⁵ Similar to most other large institutions, the armed forces are characterized by a patriarchal structure subjugated by values like rank, camaraderie, decorum, leadership, loyalty, and emotional aspects. The emphasis in the military is usually placed on male ideals, encouraging dominance concepts, risk-taking, hostility, and autonomy. The military antiquity of male-only colleague-group bonding might nurture hyper-masculinity, which perceives male interactions regarding control, rivalry, and supremacy. The power discrepancy amongst military personnel because of its masculine ruled structure and leadership contributes a key role in sexual misconduct.⁶ This is clear because most hyper-masculine and traditional principles towards women are associated with perpetration and acceptance of sexual oppression. In the military hyper-masculine males usually feel endangered by proficient women, which makes them desire constant proving of their masculinity through utilizing sexual behavior and language. Women within the military report feeling of scrutiny and inspected by men, judged as incompetent or even subjected to anger and jealousy. Also, using gendered and sexualized language like calling recruits “faggots” or “girls” and other military slangs contribute more to psychological objectification and distance.

⁵ Dawne Vogt et al., “Attitudes Toward Women and Tolerance for Sexual Harassment Among Reservists,” *Violence Against Women* 13, no. 9 (September 2007): 879-900.

⁶ Alayne J. Ormerod and Jennifer Steel, “Sexual Assault in the Military,” in the *APA handbook of the psychology of women: Perspectives on women's private and public lives*, eds. C. B Travis, J. W. White, A. Rutherford, W. S. Williams, S. L. Cook, & K. F. Wyche (American Psychological Association, 2018), 195-213.

According to Melanie Hill and Ann Fischer, entitlement is another factor that leads to increased sexual violence in the military. Because of the hyper-masculine perspective, men have a feeling of the prerogative to consistent sex.⁷ Such entitlement sense is termed as the linkage for manliness and rape-associated behaviors and insolences.⁸ Compounding the inherent entitlement sense in manic and old masculinity opinions is the armed forces accent on objectification. Female and male soldiers are usually taught to diminish other people and limiting their empathy to make killing easy. However, applying such objectification to fellow Service members might lead to enhanced entitlement sense or psychological distancing, which makes sexual violence easy to justify and perpetuate.

Another factor contributing to increases in sexual violence is cultural acceptance. In this case, a rigid chain of command and alleged “code of silence” might establish a setting where victims cannot seek help or report because of believing that no action will be taken or even fear negative consequences. From data obtained in 2014, 52 percent of females reporting sexual violence experienced reprisal.⁹ Of those sexual violence reports, below a third of the wrongdoers faced administrative or legal action for substantiated charges. Sexual violence victims in the military face dismissal, privacy intrusions, incredulous questioning, and blame even when there is evidence that the assault happened.

⁷ Melanie S. Hill and Ann R. Fischer, “Does entitlement mediate the link between masculinity and rape,” *Journal of Counseling Psychology* 48, no. 1 (January 2001): 39-50.

⁸ Andrew R. Morral et al., “Sexual Assault and Sexual Harassment in the U.S. Military: Annex to Volume 5. Tabular Results from the 2014 RAND Military Workplace Study for Installation- and Command-Level Risk of Sexual Assault and Sexual Harassment,” Santa Monica, CA: RAND Corporation, 2018. https://www.rand.org/pubs/research_reports/RR870z8.html.

⁹ Ormerod and Steel, “Sexual Assault in the Military,” 207.

Sexual violence has significant impacts on victims. Most studies have linked trauma effects from sexual violence to increased mental health struggles. Research has established connections amidst sexual assault in the armed forces and diagnosing mental health complications like depression, substance abuse, anxiety, eating disorders, psychiatric hospitalizations, post-traumatic stress disorder (PTSD), and sexual difficulties.¹⁰ A study of more than 3 million veterans from October 2002 to September 2003 revealed that 61,215 veterans screened positively for military sexual trauma (MST) based on information collected using the Veterans Health Administration's universal MST screening.¹¹ The table below illustrates the age and race adjusted odds of a mental health diagnosis.

¹⁰ Valerie A. Stander and Cynthia J. Thomsen, "Sexual harassment and assault in the US military: A review of policy and research trends." *Military Medicine* 181, no. suppl_1 (2016): 20-27.

¹¹ Rachel Kimerling et al., "The Veterans Health Administration and military sexual trauma." *American Journal of Public Health* 97, no. 12 (October 2007): 2160-2166.

Table 1. Age and Race Adjusted Odds of Mental Health Diagnosis¹²

	Women		Men	
	OR (99% CI)	AOR (99% CI)	OR (99% CI)	AOR (99% CI)
Any mental disorder	3.63 (3.50, 3.76)	2.91 (2.80, 3.02)	3.12 (3.03, 3.21)	2.44 (2.37, 2.52)
Adjustment disorders	1.69 (1.56, 1.83)	1.39 (1.28, 1.51)	2.41 (2.24, 2.59)	1.72 (1.60, 1.86)
Anxiety disorders	2.20 (2.10, 2.32)	1.84 (1.75, 1.93)	2.45 (2.34, 2.56)	1.95 (1.87, 2.04)
PTSD	11.82 (11.18, 12.50)	8.83 (8.34, 9.35)	4.12 (3.97, 4.27)	3.00 (2.89, 3.12)
Attention-deficit/conduct/ disruptive	2.63 (2.11, 3.28)	1.87 (1.49, 2.34)	4.07 (3.38, 4.89)	2.56 (2.13, 3.08)
Delirium/dementia/amnestic	0.61 (0.52, 0.71)	1.11 (0.94, 1.31)	1.04 (0.94, 1.14)	1.26 (1.15, 1.39)
Disorders of infancy or childhood	2.34 (1.25, 4.37)	2.20 (1.13, 4.27)	2.54 (1.58, 4.09)	1.95 (1.21, 3.15)
Impulse-control disorders	3.40 (2.39, 4.84)	...	3.23 (2.64, 3.95)	1.95 (1.59, 2.38)
Dissociative disorders	7.47 (5.29, 10.54)	4.97 (3.50, 7.07)	5.81 (3.81, 8.84)	3.61 (2.37, 5.51)
Eating disorders	4.13 (3.30, 5.15)	3.05 (2.43, 3.83)	4.06 (2.43, 6.81)	2.77 (1.65, 4.66)
Psychogenic disorders	2.41 (1.52, 3.81)	...	2.54 (1.56, 4.12)	1.96 (1.20, 3.19)
Sexual disorders and dysfunction	1.76 (1.34, 2.31)	1.37 (1.03, 1.81)	1.43 (1.33, 1.54)	1.30 (1.21, 1.40)
Sleep disorders	1.97 (1.54, 2.53)	1.66 (1.28, 2.16)	1.56 (1.24, 1.96)	1.27 (1.01, 1.61)
Somatoform disorder	2.48 (2.21, 2.77)	1.86 (1.66, 2.09)	2.80 (2.47, 3.18)	1.83 (1.61, 2.08)
Bipolar disorders	3.12 (2.92, 3.33)	2.25 (2.10, 2.41)	4.30 (4.06, 4.56)	2.72 (2.56, 2.89)
Depressive disorders	2.93 (2.83, 3.04)	2.33 (2.24, 2.42)	2.87 (2.78, 2.96)	2.21 (2.14, 2.29)
Personality disorders	4.60 (4.21, 5.01)	3.11 (2.84, 3.40)	5.77 (5.34, 6.24)	3.42 (3.16, 3.70)
Schizophrenia and psychoses	1.91 (1.77, 2.05)	1.65 (1.52, 1.78)	3.31 (3.15, 3.47)	2.41 (2.30, 2.54)
Alcohol disorders	3.28 (3.03, 3.55)	2.33 (2.15, 2.53)	2.67 (2.56, 2.79)	1.75 (1.67, 1.84)
Drug abuse	2.97 (2.73, 3.23)	2.12 (1.94, 2.31)	3.32 (3.16, 3.49)	2.09 (1.98, 2.20)
Suicide and intentional self-inflicted injury	2.96 (2.01, 4.37)	2.15 (1.45, 3.21)	5.34 (4.04, 7.05)	2.93 (2.22, 3.88)

Note. OR = odds ratio; CI = confidence interval; AOR = adjusted odds ratio; PTSD = posttraumatic stress disorder. An OR greater than 1 indicates that patients with MST were more likely to be diagnosed with that condition than were patients without MST. This difference is statistically significant at $P < .01$ if the 99% CI does not include 1.

HISTORY

In 2017, the Pentagon reported that sexual assault and sexual harassment cases had risen 9.7 percent, compared to the previous year.¹³ The report also indicated that in the cases that had been reported to the chain of command, only a few offenders had been prosecuted in the court-martial. The reason few offenders had been prosecuted was that

¹² Kimerling et al., "Veterans Health Administration," 2163.

¹³ Lisa Ferdinando, "DoD Releases Annual Report on Sexual Assault in Military," U.S. Department of Defense, May 1, 2018, <https://www.defense.gov/Explore/News/Article/Article/1508127/dod-releases-annual-report-on-sexual-assault-in-military/>

the chain of command preferred to punish most of the offenders outside court using alternative methods. The number of sexual assault cases reported to the chain of command was 6,769.¹⁴ Out of the 6,769 cases of sexual assault and sexual harassment reported, 2,218 cases were found to be having sufficient evidence.¹⁵ It is noted that although many officers were guilty, the chain in command decided to refer 774 of those cases to the court-martial for prosecution.¹⁶ The remaining cases were punished using alternative methods.

The officials from the Pentagon concluded that although few cases were presented for court-martial, it did not prove that the chain of command had failed in ensuring the victims of sexual assault got justice. The officials thought that the increase in the number of reported sexual assault cases and harassment indicated how willing the officers were in reporting to the chain of command. Members of the Pentagon also explained that most of the cases did not go to court-martial because most of the victims decided that they would not testify to the courts against the offenders. Due to the victim's unwillingness to testify, the chain of command opted for alternative punishment forms.

Because of increased sexual assaults and sexual harassment in the military, both the political class and veterans have given their opinions concerning the military laws and how the military's law structure undermines the possibility of the victims of sexual assaults getting justice. During congressional discussions, the ability of the chain of command solving sexual assault and sexual harassment was put into debate. Female

¹⁴ "Department of Defense Fiscal Year 2017 Annual Report on Sexual Assault in the Military," U.S. Department of Defense, accessed September 2, 2020, https://www.spirit-filled.org/documents/DoD_FY17_Annual_Report_on_Sexual_Assault_in_the_Military.pdf

¹⁵ Department of Defense, "2017 Annual Report on Sexual Assault in the Military."

¹⁶ Department of Defense, "2017 Annual Report on Sexual Assault in the Military."

senators and military veterans were the most vibrant in this debate. They suggested some critical reforms in military law that will increase the probability of punishing sex offenders in the military department.

New York Senator Kirsten Gillibrand suggested that the commanders were incapable of resolving sexual assault and sexual harassment cases because they were more focused on the missions rather than listening to the sexual related cases. Senator Gillibrand had the idea that sexual assault cases and sexual harassment cases were supposed to be handled by the prosecutors found in the military, who had no direct connection with the troops and cannot fear being demoted. Senator Gillibrand advocated for accountability in the military when dealing with sexual assault and sexual harassment cases considering the trauma and psychological torture the victims of sexual offenses usually go through. She called for a change in the military structure, aiming at criticizing the chain of command in failing in its responsibilities of ensuring that they provide a safe working environment in the military.

As the Senate Armed Services Personnel Subcommittee ranking member, Senator Gillibrand, along with Senator Chuck Grassley (R-IA) and Senator Ted Cruz (R-TX), offered the bipartisan Military Justice Improvement Act as an amendment to this year's National Defense Authorization Act. The Military Justice Improvement Act seeks to professionalize how the military prosecutes crimes by removing the chain of command's decision to independent, trained, professional military prosecutors. By eliminating the decision-making from the chain of command, supporters of the act believe this will remove the fear that survivors experience when deciding whether to report crimes committed against them. Specifically, the Military Justice Improvement Act seeks to

grant authority to send criminal charges to trial to designated judge advocates in the rank of O-6 or higher who possess significant criminal justice experience. Secondly, it seeks to ensure that vested judge advocates with disposition authority are outside of the chain of command of the accused, exercise professional judgment when deciding whether to proceed to court martial, and render decisions free from conflicts of interest.¹⁷

Arizona Senator Martha McSally, who is also a military veteran, is an active supporter of military sexual assault reforms. McSally spoke about the psychological trauma she had gone through while serving as a military officer after being raped by a senior officer and not being able to get justice.¹⁸ She blamed her suffering to the chain of command and suggested that the responsibility of solving sexual assault and sexual harassment cases in the military should be given to an independent individual. Officials from the Pentagon also agreed on the need for reforms in the military. Some of the senators were opposed to the idea of changing the structure of the military and thought that the responsibility of solving sexually related cases should be left to the chain of command, but still thought that the problem needed a lot of attention.

During a hearing done by the Armed Services Subcommittee, some veterans, who had previously gone through sexual assault and sexual harassment while serving in the military testified. One of the survivors, Erin Elliot, who had worked in the Navy for 14 years, said that she had been sexually assaulted by one of her best friends in the military.

¹⁷ "Gillibrand, Grassley, Cruz Offer Bipartisan Military Justice Improvement Act as Amendment to Defense Bill," Press, Kirsten Gillibrand United States Senator for New York, July 1, 2020, <https://www.gillibrand.senate.gov/news/press/release/gillibrand-grassley-cruz-offer-bipartisan-military-justice-improvement-act-as-amendment-to-defense-bill>.

¹⁸ "Congress should Revisit Feres Doctrine to End Military Sexual Assault, Claims Center for Law & Military Policy," *PR Newswire*, March 11, 2019, <https://www.prnewswire.com/news-releases/congress-should-revisit-feres-doctrine-to-end-military-sexual-assault-claims-center-for-law--military-policy-300809889.html>.

Some of her colleagues later ridiculed her.¹⁹ Like McSally, Elliot advocated for change in the military, especially on the handling of sexual assault cases. Don Christensen, a retired colonel, echoed Elliot's sentiments and suggested that sexual assault cases required an attorney who had the vast experience to act as a prosecutor.

There have been many unproven reports suggesting that cases of sexual assault are higher in the military department compared to the civilians. Although the reports are unproven, some of the underlying factors explaining why the idea of sexual assault can affect the men in uniform include the military department's policy, which makes it very difficult to report sexual assault cases and harassments. Most military personnel's lifestyle can also lead to sexual immoralities and sexual assault; a majority of military Service members are alcoholics. Another factor that can lead to increased cases of sexual assaults in the military is military personnel's general attitude towards women. Looking at the increased number of sexual assault and harassment cases, it brings the impression that sexual offenses are tolerated in the military. Sexual offenders have been allowed to walk scot-free, leaving the victims to have lifetime injuries knowing that the person who assaulted them was never prosecuted. This can lead to lifetime grudges, especially on the side of the victim.

To reduce these cases, rules should be put in place that directly address gender-based violence in the military department. This will significantly reduce the number of sexual assault and sexual harassment cases. Military personnel should also be provided with psychological therapy. While in the line of service, most of the servicemen go

¹⁹ Kristina Peterson and Ben Kesling, "Military Chain of Command Under New Scrutiny in Assault Cases," *The Wall Street Journal*, May 22, 2019, <https://www.wsj.com/articles/senate-debates-role-of-military-commanders-in-sexual-assault-cases-11558553173>.

through tough experiences that can lead to psychological trauma, allowing them to go for therapy will play a big part in ensuring that the military becomes the disciplined forces they are supposed to be.

POLICY PROPOSAL

The goal of the following policy proposal is to increase reporting and overall, decrease incidences of sexual assault and harassment in the military. Altering the military justice system from the command-based structure by removing the authority of commanders to determine in individual cases whether felony-level charges are brought would achieve those two goals. The reform will grant power for prosecuting serious crimes to independent and well-trained prosecutors who have experience in trials. While other military crimes will remain under the same chain of command, the suggested policy reform will ensure sexual assault cases are handled by an officer from a different chain of command and that the commissioned officer dealing with the case exercises professional prosecutorial judgment when making decisions about the case. The amendment will help avoid any conflicts of interest by tasking an independent person to handle the sexual offense case instead of commanding officers.

The National Defense Authorization Act (NDAA) provides authorization of appropriations for a range of DOD and national security programs. Legislation adopted as part of the NDAA can be used to amend the Uniform Code of Military Justice (UCMJ). According to the UCMJ, the ultimate decision on charges rests with a convening authority under the current law, a commander who does not need to be a lawyer. The convening authority is required to hold a preliminary hearing and obtain pretrial advice

from a staff judge advocate,²⁰ who must advise the convening authority in writing that an offense might have been committed by the accused.²¹ By the commander's order, a military tribunal is "convened," in which the judge, the lawyers, and the Service members who make up the jury try the accused. Once a verdict has been decided and a sentence is delivered, the participants' work is complete, and they disband. Ordinarily, commanders have the discretion to enforce or disregard the verdict and sentence rendered by the tribunal based on their judgment on what will best serve their broader mission.

In order to reform the military justice system from its current command authority structure to a more professionalized system for prosecuting serious crimes, enacting Senate Bill 1789, the Military Justice Improvement Act of 2019, the NDAA would be amended to authorize the Secretary of Defense to establish an alternative military justice system utilizing judge advocates outside of the accused's chain of command for felony-level charges, such as sexual assault. Under the proposed amendment, no offense for which the maximum authorized punishment exceeds one year's confinement may be tried or even referred for court martial without the approval of an O-6 or above judge advocate who is outside the chain of command of the charged individual.²²

Once a serious offense is reported, the case will be referred to a commissioned officer. The authorized officer who is outside the victim's chain of command will then make a decision as to whether to prosecute the case and the charges to be preferred.²³ If the commissioned officer determines that the case meets the guidelines for prosecution,

²⁰ Article 32, UCMJ, 10 U.S. Code § 832 (2018).

²¹ Article 34(a)(1), UCMJ, 10 U.S. Code § 834(a)(1) (2018).

²² "Military Justice Improvement Act as Amendment to Defense Bill."

²³ "S. 1789 – Military Justice Improvement Act of 2019," Congress.gov, accessed September 17, 2020, <https://www.congress.gov/bill/116th-congress/senate-bill/1789/text>.

or prefers any charges, the officer will forward the case for court-martial, and decide the type of court-martial the case should be tried. The decision by the commissioned officer will be binding to any convening authority. The commissioned officer's decision not to refer charges for the reported crimes will not alter the commanding officer's authority to refer cases for trial by the convening authority or to impose non-judicial punishment for conduct covered by the charges.²⁴ While this proposal advocates a shift away from command authority, the accused's commanding officer will be able to submit written recommendations to this single-purpose convening authority, in which he or she can explain what impact a prosecution is likely to have on overall mission readiness and command cohesion. This written recommendation would be weighed along with written recommendations submitted by any victims or the accused themselves.

As of June 11, 2019, Senate Bill 1789 has been read twice and referred to the Committee of Armed Services.²⁵ Although currently filibustered, it provides an opportunity for the Secretary of Defense to provide input for potential draft changes to further clarify logistical and administrative issues of this type of reorientation. Given the full scope of reforming the military justice system, administrative costs for staffing needed to achieve the proposed consolidation of convening authority is unknown.

POLICY ANALYSIS

There have been various inquiries and reviews in previous years that have evaluated military justice systems, especially in matters of sexual harassment. The current justice system gives the commanding officers the power to decide how to handle

²⁴ "S. 1789 – Military Justice Improvement Act of 2019."

²⁵ "S. 1789 – Military Justice Improvement Act of 2019."

sexual assault allegations. In most cases, the commanders cannot handle the sexual assault cases professionally and unbiased, hence failing to protect the right of sexual assault victims. The unprofessional handling of severe cases by commanding officers led to the MJIA that would take sexual harassment cases out of the command chain. The act would remove the systemic fear experienced by victims of sexual assault by the commanding officers' sole decision-making power to determine the case's outcome.

The introduction of new reforms suggested that the decisions over whether to prosecute a perpetrator are placed in trained and independent military prosecutors. The reform is anticipated to enhance the military's capability to fairly investigate and prosecute sexual harassment offenders while safeguarding the victims' privacy.²⁶ These reforms are modeled from the Israel Defense Force's Military Justice Law (MJL) that eliminated sexual harassment and assault allegations from the chain of commands. Changes to Israel's MJL attributed to an increase in the rate of reporting and prosecution. It is expected that these reforms will free commanders of conflicting responsibilities and enhance their role of maintaining good discipline and keeping their environment free of sexual assaults.

Israel Defense Force

The Israeli Defense Force (IDF) is a compulsory service that includes air, naval, and ground forces. Every Israeli citizen above the age of 18 is required to serve in the IDF. Thirty-two months is the minimum period for men to serve, while women are required to serve for a minimum of 24 months.²⁷ The IDF consists of 33 percent of

²⁶ Elizabeth P. Winkle et al., 2019, "Sexual Assault and Accountability Task Force." https://media.defense.gov/2019/May/02/2002127159/-1/-1/1/SAATF_REPORT.PDF.

²⁷ "Our Soldiers," Israel Defense Force, accessed November 9, 2020, <https://www.idf.il/en/minisites/our-soldiers/>.

women, including 51 percent of IDF officers, 15 percent of technical forces, and 3 percent of IDF combat soldiers.²⁸ By contrast, the US military has more than 1.3 million active-duty Service members, of which 233,435, or 17 percent, are women.²⁹

In 1955, Israel enacted the Military Justice Law, which established a system to adjudicate military and civilian criminal offenses by active and reserve Service members.³⁰ Since its enactment, few changes have been made to the Military Justice Law. Similar to the system proposed in the MJIA, disciplinary procedures in the case of sexual offenses have been updated to include removing the determination of adjudication from the chain of command. The MJL authorizes two mechanisms to adjudicate offenses, trial by a military court through the Office of the Military Advocate for Operational affairs or disciplinary adjudication by commander or adjudication officers via the Military Defense.³¹

The Military Advocate General (MAG) is an independent legal advisor to commanders appointed by the Minister of Defense. When acting in their advisory and legal capacity, MAGs do not fall within a commander's chain of command. The military courts consist of a system of regional trial courts and a military court of appeals. Contrasting to other military violations by adjudication, the MAG can be responsible for adjudicating decisions concerning sexual offenses. Lighter sexual offenses in disciplinary

²⁸ "Fact Sheet on Israeli Military Justice," Response System Panel: George Washington University Law School, https://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/other/03_Israel_Fact_Sheet.pdf.

²⁹ "DoD Personnel Workforce Reports & Publications," Department of Defense, accessed October 28, 2020, https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp.

³⁰ Ruth Levush, "Military Justice System: Adjudication of Sexual Offenses: Israel," last modified July 2013, <https://www.loc.gov/law/help/militaryjustice/israel.php>.

³¹ "The IDF Military Justice System," Israel Defense Forces, accessed November 9, 2020, <https://www.idf.il/en/minisites/military-advocate-generals-corps/the-idf-military-justice-system/>.

proceedings are handled by Adjudication Officers (AO). The officer must have at least a Lieutenant Colonel rank and have either experience on sexual harassment handling through special training or legal education from Military Justice School in IDF.³² The MAG maintains a database of AOs, and the MAG and not the commander select the AO for these disciplinary actions.³³

Implications for Removing Sexual Assault Offenses from the Chain of Command

Like IDF's MJL, the changes proposed in the MJIA removes the prosecution of the sexual assault from commanders to prosecutors in the military. A former IDF MAG stated that "a prosecuting decision can be created through a system that allows the decisions to be exclusive in the bailiwick of [MAG] and a belief that is profoundly reflected in the separation between [MAGs] and the commanders is necessary to prevent undue command influence."³⁴ Furthermore, members of the IDF assert that the reforms enacted related to sexual assault have increased victims' confidence that their complaints will be addressed appropriately.³⁵ Under the MAG's supervision, on average, 19 percent of investigations have resulted in indictments.³⁶

Additionally, according to testimony provided in a 2013 hearing before the Senate Committee on Armed Services, IDF's reporting had increased by 80 percent in the last five years.³⁷ Historically, victims of sexual assault in the US have been reluctant to report

³² Levush, "Military Justice."

³³ Levush, "Military Justice."

³⁴ *Sexual Assaults in the Military regarding pending legislation: Hearing Before the S. Comm. on Armed Services*, 113th Cong. (2013) (the statement by Amos Guiora).

³⁵ *Pending Legislation*

³⁶ Emily Hazen, "Restructuring U.S. Military Justice Through a Comparative Analysis of Israel Defense Forces," *Wisconsin Journal of Law, Gender & Society* 34, no. 2 (2019): 202.

³⁷ *Pending Legislation*

sexual offenses due to a lack of trust that their chain of command will handle cases appropriately.

According to the 2019 Military Services Gender Relations Focus Groups report by the Office of People Analytics, Service members who experience sexual assault may choose not to report the incident for fear that their information and report will not remain confidential. The loss of anonymity often leads to fear of retaliation from the alleged offender, peers, or leadership if an unrestricted report is filed. Focus group participants also stated that the command climate influences their decision to report depending on whether they think they will be taken seriously or do not believe their report or complaint will be addressed.³⁸ It was reported that the perceived lack of inaction is partly due to the inconsistent enforcement of sexual assault, sexual harassment, and gender discrimination, which leads Service members to undermine their faith in leadership.³⁹ Additionally, participants identified how some leadership messages discourage reporting when some leaders emphasize having low numbers of sexual assault.⁴⁰ This particular factor is one that has not been discussed in the previous active duty focus group efforts.⁴¹

The military justice system is designed to provide a fair criminal justice system for Service members and help commanders maintain good order and discipline vital to their missions. Because of the commanders' responsibility and authority for deciding the correct attitude of charges of wrongdoing under the UCMJ, reforms to remove the chain of command from serious offenses, like sexual assault, would be unparalleled. However,

³⁸ Lisa Davis and Dr. Ashlea Klahr, "2019 Military Services Gender Relations Focus Groups" (OPA Report No. 2020-065, Alexandria, Virginia, 2020).

³⁹ Davis and Klahr, "Gender Relations."

⁴⁰ Davis and Klahr, "Gender Relations."

⁴¹ Davis and Klahr, "Gender Relations."

according to a shadow advisory report to the Senate and House Committees on Armed Services states that an alternative military justice system has several implications that are “manageable, and the benefits exceed the costs.”⁴²

Overall, the alternative system would leave the commanders’ overall concept as the convening authority; however, it would remove specified offenses from the commander. According to the report, this concept is also not new as the UCMJ permits commanders to refer charges against personnel who are not of their command.⁴³ Thus, allowing for the disposition decision of the recommended specified offenses to be made by an officer, not of the accused’s chain of command. Additionally, the panel reported that the alternative military justice system should require few, if any additional legal personnel, assuming each service dedicates one or more O-6 or above judge advocate from current personnel to make disposition decisions.⁴⁴

The report also indicates that the alternative system should reduce case processing times. The decision-maker will be a trained attorney familiar with the system and the standards that govern charging decisions. Because convening authorities have several other duties, including those that are more urgent and time-consuming, the current system can move slowly. Although some commanders can accumulate knowledge under the current system, routine personnel changes result in much of that experience being regained with every new commander.

⁴² Jeff Blackett et al., “Alternative Authority for Determining Whether to Prefer or Refer Charges for Felony Offenses Under the Uniform Code of Military Justice” (Shadow Advisory Report to the Senate Committee on Armed Services and the House Committee on Armed Services, April 20, 2020).

⁴³ Blackett et al., “Alternative Authority.”

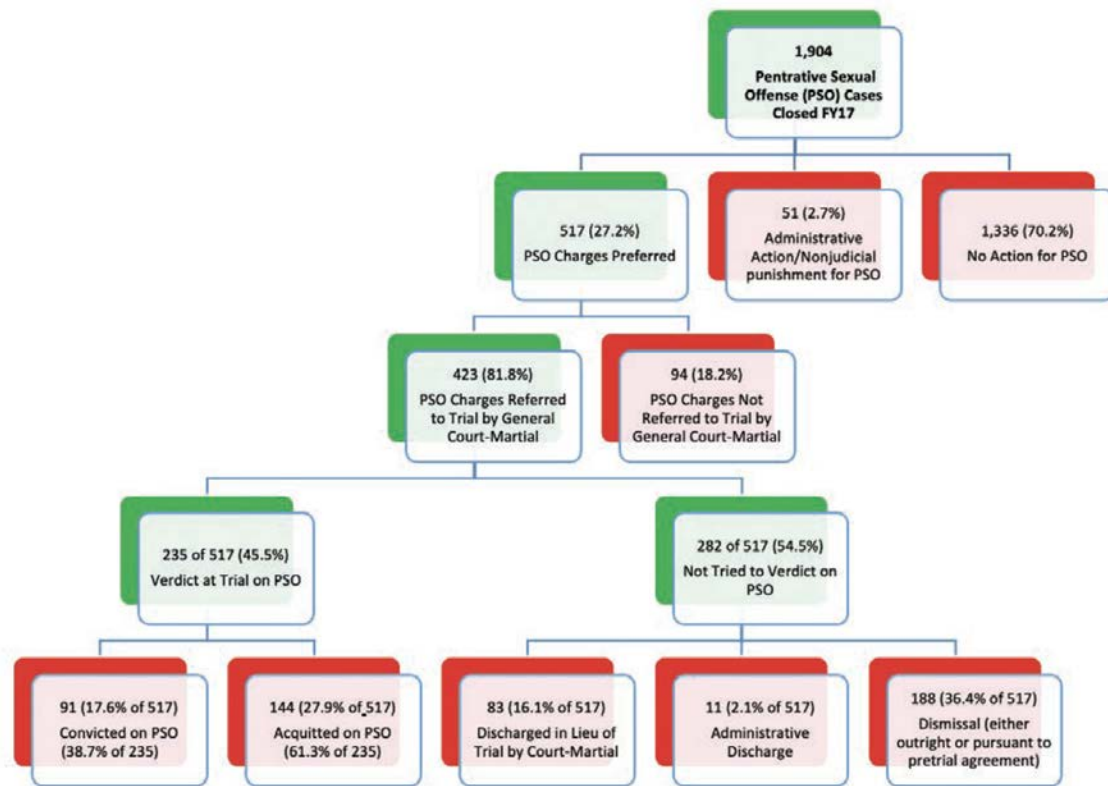
⁴⁴ Blackett et al., “Alternative Authority.”

Despite the feasibility of an alternative military justice system, some are opposed to removing the commanders' central role claiming that it would be difficult for a lawyer with no connection to the command to assess and impact the good order and discipline of a unit. This has been the main opposition to moving to an alternative other than a command system. However, evidence suggests commanders' concerns being unable to properly dispossession sexual assault offenses are unfounded. Studies have shown that commanders have capably and reasonably exercised prosecutorial authority.

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) determined in the fiscal year 2017, commanders' disposition decisions were overwhelmingly reasonable. Members and staff performed in-depth reviews of 1,904 cases documenting investigations of sexual offenses. The members determined that there is no "systemic problem with the initial disposition authority's decision to either prefer a penetrative sexual offense charge or take no action against the subject for that offense. In 94.0% and 98.5% of cases reviewed, respectively, those decisions were reasonable."⁴⁵ In particular, it was determined that the decision to prefer a penetrative sexual offense charge or take no activity against the subject for that offense fell inside the range of appropriate outcomes, even if the reviewer might have made a different decision. The flow chart below summarizes the results of commanders' initial and subsequent decisions, as well as the ultimate disposition of penetrative sexual offense allegations.

⁴⁵ Martha Bashford et al., "Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in the Fiscal Year 2017" (Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, Arlington, Virginia, October 2020).

Figure 2. Commanders' Initial and Subsequent Decisions and Ultimate Disposition of Penetrative Sexual Offense Allegations⁴⁶



Review and analysis of the initial disposition decisions were limited to documents and other materials provided in the investigative materials, and pretrial and trial materials used in cases that resulted in preferred penetrative sexual offense charges. For the first time, reviewers also evaluated the materials against the evidentiary standards of probable cause. Article 32 of the UCMJ requires the preliminary hearing officer to make a probable cause determination and recommendation on case disposition.⁴⁷ In addition, under Article 34 of the UCMJ, another probable cause analysis is contained in the staff judge advocate's pretrial advice.⁴⁸ Using this method, DAC-IPAD's results were similar

⁴⁶ Bashford et al., "Sexual Offense Cases."

⁴⁷ Article 32(c), UCMJ, 10 U.S. Code § 832(c) (2019).

⁴⁸ Article 34(a)(1), UCMJ, 10 U.S. Code § 834(a)(1) (2018).

to other civilian case studies. Evidentiary factors and victim cooperation were significant predictors of an arrest in civilian sexual assault cases.⁴⁹ In the military cases reviewed, these were also significant predictors of whether charges were preferred.

However, the DAC-IPAD also found that the command routinely imposed adverse actions on the accused immediately after an allegation of a sexual offense, regardless of whether the allegation was ultimately determined to warrant referral of charges or imposition of other adverse action against the subject, or even whether the evidence established reasonable justification to accept that the subject had perpetrated any lawbreaker offense.⁵⁰ Although there is concern regarding the adverse actions taken and the possibility of further reducing this number by removing these types of offenses from the commanders' disposition authority, the overall implication of the report is that the DAC-IPAD does not believe that replacing commanders with judge advocates would result in more appropriate disposition decision making.

Although it has been suggested that an alternative military justice system is feasible with relatively limited personnel changes, the shadow advisory report acknowledges that several other features need further development. For example, the experts could not determine the actual cost of the change due to details like whether the designated judge advocate would spend the accused's command money or if judge advocates would have their own funding.⁵¹ Also, consolidating adjudication for felony-level offenses by a single convening authority may not be as efficient as anticipated. For example, in the fiscal year 2019, the Army held 1,359 courts-martial and more than

⁴⁹ Melissa S. Morabito et al., *Decision Making in Sexual Assault Cases: Replication Research on Sexual Violence Attrition in the U.S.* (2019).

⁵⁰ Bashford et al., "Sexual Offense Cases."

⁵¹ Blackett et al., "Alternative Authority."

24,000 non-judicial punishments.⁵² With the number of offenses, a single convening authority would likely be no more efficient than the current system. Additionally, the amount of personnel required to support a single convening authority was underestimated by the shadow advisory panel. In a public hearing in February 2020, Captain Bethany Payton-O'Brien, a former military judge and defense attorney, opined that there is currently not enough support staff to keep up with discovery obligations. The lack of staffing leads to "judges now having to take up discovery issues right before a trial. That impacts military justice and how cases languish in the system."⁵³

POLITICAL ANALYSIS

Public Opinion

The death of Army Specialist Vanessa Guillén has brought renewed attention to military sexual violence. The #MeToo hashtag went viral in 2017 after a celebrity tweet encouraged followers to use the phrase as their status to help illustrate the problem's magnitude. Before the death of Guillén, several other scandals throughout the Armed Forces had come to light. In 2017, the Marines Corps experienced a scandal when investigative reports revealed that naked servicewomen photos were shared on a closed Facebook group. On the USS Arlington, a female Service member found a camera in the women's bathroom. In addition, on the USS Wyoming, a submarine, a group of sailors filmed at least a dozen women serving aboard the sub as they undressed and showered.

⁵² Daniel J. Everett and Shaun S. Speranza, "Report of the Joint Service Subcommittee Prosecutorial Authority Study" (Joint Service Committee on Military Justice, September 2, 2020).

⁵³ *16th Public Meeting: Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces*, United States Department of Defense (2020) (the statement by Captain Bethany Payton-O'Brien).

High profile support from other celebrities, among many others, pushed the conversation about widespread sexual abuse into the national spotlight. But the phrase had been around since 2006, coined by sexual harassment survivor and activist Tarana Burke. According to a 2018 Pew Research Center analysis, #MeToo has been used more than 19 million times on Twitter, which averages 55,319 uses of the hashtag per day.⁵⁴ Additionally, the report shows that nearly 65 percent of adults using social media say that some of the content they see on these platforms pertain to sexual harassment or assault. Of this group of adults, 29 percent report seeing a great deal of content focused on this issue.

However, before Guillén's death, a Gallup report from 2019 revealed that US men are less convinced that sexual harassment is a significant problem in the workforce. The report also showed that these men believed that people in the workforce are too sensitive to sexual harassment. Although men are likely to think that sexual harassment is not an issue, overall, 62 percent of Americans still agree that it is a major problem, and 54 percent do not believe people are sensitive enough to the issue.⁵⁵

⁵⁴ Monica Anderson and Skye Toor, "How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral," Pew Research Center, last modified October 11, 2018, <https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/>.

⁵⁵ Megan Brennan, "U.S. Men Less Concerned Than in 2017 About Sexual Harassment," Gallup, last modified March 18, 2019, <https://news.gallup.com/poll/247823/men-less-concerned-2017-sexual-harassment.aspx>.

Table 2. Gender Differences in Views of Sexual Harassment as a Major Problem⁵⁶

Gender Differences in Views of Sexual Harassment as a Major Problem			
% Who say sexual harassment in the workplace is "a major problem"			
	October 2017	February 2019	2017-2019 difference
	%	%	pct. pts.
Men younger than 50	71	55	-16
Men aged 50+	59	49	-10
Women younger than 50	74	72	-2
Women aged 50+	72	69	-3
GALLUP			

Judicial Support

The United States Supreme Court has agreed in October 2020 to hear arguments over prosecuting sexual assaults in the military. The case is the first to come to the highest court in the US since the #MeToo movement shed light on sexual abuse and harassment. The question before the court is whether a limitations period applies to assaults committed before a specific timeframe. If the Supreme Court rules that the lower court was wrong, three Air Force members' convictions would be reinstated and older cases to be prosecuted.

In 1977, capital punishment for the rape of an adult woman was outlawed. However, the ruling does not apply to the military. According to military law, rape is punishable by death, and there are no time limits for prosecuting death-punishable crimes.⁵⁷ Based on the ruling, the Court of Appeals for the Armed Forces cited the prohibition on capital punishment to vacate the convictions of three Service members who were charged more than five years after committing their crimes.

⁵⁶ Brennan, "Less Concerned."

⁵⁷ Jordan S. Rubin, "Justices to Hear First #MeToo-Era Assault Case from Military," Bloomberg Law, last modified October 13, 2020, <https://news.bloomberglaw.com/us-law-week/justices-to-hear-first-metoo-era-assault-case-from-military>.

The ruling is still unknown as the hearings were just recently held. For victims, a ruling reinstating the convictions and allowing older cases to be prosecuted would provide justice for those whose cases have been ongoing for several years. It may seem unfair for the accused to be tried for an offense that comes with significant penalties if found guilty when evidence may no longer exist. However, the ruling could also send a message to potential offenders about the commitment to a zero-tolerance policy and to victims, an understanding of how difficult it may be to come forward.

Congressional Support

The House Armed Services Subcommittee on Military Personnel has jurisdiction over DOD policy and programs related to military personnel and their families, as well as the UCMJ. The I Am Vanessa Guillén Act was introduced with the bipartisan support of Markwayne Mullin (R-OK), Sylvia Garcia (D-TX), John Carter (R-TX), Veronica Escobar (D-TX), Pete Olson (R-TX), Jason Crow (D-CO), and Gilbert R. Cisneros, Jr. (D-CA) in honor of the late Vanessa Guillén and survivors of military sexual assault. Similar to the Military Justice Improvement Act introduced by Senator Gillibrand, the bill seeks to move adjudication authority outside of the chain of command.

Senator Martha McSally of Arizona is another supporter of change to address military sexual assault. During a Senate Armed Services subcommittee meeting, McSally revealed that she was a survivor of military sexual assault but did not report the incident because she did not trust the system.⁵⁸ Unlike the changes to the military justice system of removing command authority, McSally advocates that commanders “must not be

⁵⁸ Elizabeth Landers and Zachary Cohen, “GOP senator reveals she was sexually assaulted when she served in the military,” CNN, last modified March 7, 2019, <https://www.cnn.com/2019/03/06/politics/martha-mcsally-rape-sexual-assault-survivor/index.html>.

removed from the decision making responsibility of preventing, detecting, and prosecuting military sexual assault.”⁵⁹ Instead, she envisions the issue of military sexual assault improving through a culture change, which must involve commanders instead of letting them off the hook by removing them from the process. In reaction to McSally’s comments, Senate Majority Leader Mitch McConnell stated, “whatever policy prescriptions Senator McSally...may come up with, we’d certainly be open to.”⁶⁰

Although there is bipartisan support for addressing the issue of military sexual assault, negotiations are still ongoing to determine the final version of the NDAA for the fiscal year 2021. Because of the law’s size and scope, with its numerous provisions across several security and national defense areas, it is unlikely that provisions for an alternative military justice system would be included. In addition, Section 540F of the NDAA for the fiscal year 2020 required a study and report evaluating an alternative military justice system’s feasibility. According to the report submitted by the Joint Service Subcommittee, members found that removing commanders from the chain of command as the center of the military justice system neither feasible nor advisable.⁶¹ Based on these findings, members may choose alternative avenues for addressing the under-reporting and prevention of sexual harassment and assault.

RECOMMENDATION

The way cases concerning sexual misconduct are handled in the military is very different from how the normal justice system handles them. Numerous changes and improvements associated with reporting and investigations of sexual assaults in the chain

⁵⁹ Landers and Cohen, “GOP senator.”

⁶⁰ Landers and Cohen, “GOP senator.”

⁶¹ Everett and Speranza, “Prosecutorial Authority Study.”

of commands were developed to facilitate the handling of sexual assault cases. This is because it was assumed that commanders were the only party capable of ensuring a credible prosecutorial response when any sexual assault case is reported. MJIA amendments are unnecessary because prosecutorial authority is evidently the most crucial tool possessed by military commanders to ensure disciplined Service members ready for mission accomplishment.⁶² Divesting military commanders of these roles will degrade the United States military's response to sexual assaults in the rank.

It is unfounded and speculative to imply that removing the command chain of command will prevent sexual misconduct in the military. Although the proponents of the MJIA argue that similar policies have succeeded in other countries such as Israel. In reality, sexual assault cases cannot be fixed by designing a new regulation that does not address the issues. MJIA might not bring effective solutions to prevent cases of sexual assault and increase sexual assault reporting. The current military justice system is well designed to handle sexual assaults as compared to the amendments proposed under MJIA, which aims at ensuring all Service members have access to a fair criminal justice system and gives commanders the power to ensure discipline and good order necessary to accomplish their missions.⁶³ A Service member who commits an offense against any person, including civilians, is subject to UCMJ's jurisdiction. Given the global deployment of US military personnel, the current military justice system is necessary. Because of the vital role commanders play in ensuring discipline and good order in the military, removing the chain of command is not recommended.

⁶² David A. Schlueter, "American Military Justice: Retaining the Commander's Authority to Enforce Discipline and Justice." Available at SSRN 3644621 (2020).

⁶³ Chelsea Arnold and Sandra Lee, "Examining United States military sexual misconduct policy processes," *International Journal of Sociology and Social Policy* (2019).

The MJIA cannot be justified as the right way to enhance military response to sexual misconduct and reporting. Many improvements have been designed to ensure sexual assault victims present their cases to commanders. There have been many efforts and improvements to empower commanders' prosecutorial authority to ensure both victims and accused get justice. As reported by the DAC-IPAD, commanders' disposition decisions are appropriate and divesting military commanders of this authority would not improve the reporting of or the overall sexual assault and harassment incidents.

A commander in the military has various tools and resources available to endorse disciplines and good order. The tools include administrative remedies such as executive officer inquiry, formal counseling, informal counseling, and non-judicial punishment.⁶⁴ These crucial tools enable the commanders to address misbehaviors and to deal with Service members who violate rules. The tools help commanders show Service members that there are ramifications, swift, and immediate, for misbehavior or poor decisions. The critical administrative remedy is the ability to terminate Service members for misdeeds. The power to refer Service members to court-martial makes the Service members know that there are penalties for any misdeed. Removing this power from commanders removes an indispensable authority that cannot be transferred or delegated to another.

Under the current military judicial system, the commanding officers establish whether to send a suspected criminal to court-martial and determine the charges to be brought against the perpetrator.⁶⁵ There is no evidence suggesting that commanding officers are refusing to refer sexual misconduct cases to court-martial. In reality, some

⁶⁴ Julie K. Carson and Brad R. Carson, "The historical roots and future directions for military law and policies on rape and sexual assault," *Military Psychology* 30, no. 3 (May 2018): 181-192.

⁶⁵ Schlueter, "American Military Justice," SSRN 3644621.

commanding officers send suspected criminals to court-martial because they are eager to enforce discipline and good order to their troops.

The Military Justice Improvement Act should not be implemented as a means to increase the number of sexual assault reporting and to reduce sexual assault cases, which seems to be the main reason behind removing commanders of their prosecuting and referral power. Instead, the goal should be to develop an impartial and fair justice system that would enable both victims and accused alike to get justice. The solution to preventing sexual assault and increasing reporting cannot be achieved by eliminating the commanding officers' authority.

CURRICULUM VITAE

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